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Supreme Court of the United States.

OCTOBER TERM, 1967.

CHARLES W. BARTLETT, TRUSTEE, ET AL.,
Petitioners,
v.
COMMONWEALTH OF MASSACHUSETTS,
Respondent.

CHARLES W. BARTLETT, TRUSTEE, ET AL.,
Petitioners,
v.
MASSACHUSETTS BAY TRANSPORTATION AUTHORITY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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Table of Contents

Opinions below 2

Statement of the grounds on which the jurisdiction of this Court is invoked 2

Question presented for review 2

Constitutional provisions and statutes 3

United States Constitution 3

Bankruptcy Act, sec. 77, 11 U.S.C. § 205 3

Interstate Commerce Act, sec. 1 (18), 49 U.S.C. § 1(18) 9

Massachusetts General Laws (Ter. Ed.) 9

Statement of the case containing the facts material to the consideration of the questions presented 10

Reasons for granting the writ 14

I. The decision of the Court of Appeals for the First Circuit in this case is in direct conflict with decisions in the Fourth and Eighth Circuits 14

II. The case presents an important question of federal law which was decided incorrectly by the Court of Appeals and which should be resolved by this Court 17

A. The opinion of the Court of Appeals is contrary to the statutory mandate giving the District Court exclusive jurisdiction of the property of a railroad in reorganization 17

B. The Court of Appeals has disregarded the provisions of section 77(o) of the Bankruptcy Act 20

C. The decision of the Court of Appeals is contrary to the Supremacy Clause of the United States Constitution 25

Conclusion 28
Appendix 30
Opinion of United States District Court for the District of Massachusetts 30
Opinion of United States Court of Appeals for the First Circuit 35
Judgment of the United States Court of Appeals for the First Circuit 41
Docket entries in the United States District Court 42
Complaint of Commonwealth of Massachusetts 47
Motion to intervene of Massachusetts Bay Transportation Authority as a plaintiff 53
Motion of Boston and Providence Railroad to add Trustees of the New York, New Haven and Hartford Railroad as defendants 54
Answer and counterclaim of defendant Charles W. Bartlett, Trustee of Boston and Providence Railroad Company 55
Answer and counterclaim of defendants Richard Joyce Smith and William J. Kirk, Trustees of New York, New Haven and Hartford Railroad Company 59
Plaintiff's motion for summary judgement 66
Motion of defendant Charles W. Bartlett to dismiss complaint 67
Motion of defendant Charles W. Bartlett for summary judgment 68
Motion of defendants Richard Joyce Smith and William J. Kirk, trustees, for summary judgment 69
Motion of defendants Richard Joyce Smith and William J. Kirk, trustees, to dismiss complaint 70

Plaintiff's motion to dismiss counterclaim 71
Agreed statement of facts 72
Letter, dated January 2, 1968, from Charles W. Mulcahy, Jr., et al. to Thaddeus Forbes 78

Table of Authorities Cited.

Cases.

Baldwin, Ex parte, 291 U.S. 610 18
Bankers Trust Co. v. Gebhart, 195 F. 2d 238 22
Boston & Providence Railroad Corp., In the Matter of, 260 F. Supp. 415 11
Braen v. Pfeifer Oil Transportation Co., Inc., 361 U.S. 129 20
Buckhannon & Northern Railroad Co. v. Davis, 135 F. 707 15, 16, 18, 28
Chicago, Rock Island & Pacific Railroad Co. v. City of Owatonna, 120 F. 2d 226 14, 15, 16, 18, 25, 28
Continental Illinois Bank & Trust Co. v. Chicago, Rock Island & Pacific Railroad Co., 294 U.S. 648 18
Converse v. Commonwealth of Massachusetts, 101 F. 2d 48 23n.
Denver & R.G.W.R. Co., In re, 32 F. Supp. 244 23n.
Ecker v. Western Pacific R. Corp., 318 U.S. 448 20
Fonda, J. & G. R. Co., In re, 95 F. 2d 397 23n.
Franklin National Bank v. New York, 347 U.S. 373 26
Gardner v. New Jersey, 329 U.S. 565 17, 18
Long Island R. Co., In re, 92 F. Supp. 85 23n.
Palmer v. Massachusetts, 308 U.S. 79 18
United States v. New York, N.H. & H. R.R., 348 F. 2d 151 19, 27

STATUTES.

Constitution of the United States, Art. I, § 8 3
Constitution of the United States, Art. VI, cl. 2 3

Bankruptcy Act, § 77, 11 U.S.C. § 205 2 et seq.
28 U.S.C. § 1254(1) 2
Interstate Commerce Act, § 1 (18), 49 U.S.C. § 1(18) 9, 23
Massachusetts General Laws (Ter. Ed.) c. 160
§ 6 9, 20n.
§ 7 10, 20n.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Charles W. Bartlett, petitioner, as he is Trustee of the property of the Boston and Providence Railroad Corporation, and Richard Joyce Smith and William J. Kirk, petitioners, as they are Trustees of the property of the New York, New Haven and Hartford Railroad Company, pray that a writ of certiorari issue to review the judgment of the

United States Court of Appeals for the First Circuit entered in the above actions on November 8, 1967.

Opinions Below.

The opinion and judgment of the United States District Court for the District of Massachusetts, reported in 266 F. Supp. 390, is reprinted at pages 30 through 34 of the Appendix.

The opinion of the Court of Appeals, reported in 384 F. 2d 819, is reprinted at pages 35 through 41 of the Appendix.

Statement of the Grounds on which the Jurisdiction of This Court is Invoked.

The judgment of the Court of Appeals was entered November 8, 1967.

No request for a rehearing was made and no extension of the time within which to petition for certiorari was ordered.

This petition for certiorari is filed in accordance with the provisions of 28 U.S.C. § 1254(1), and the jurisdiction of this Court is invoked thereunder.

Question Presented for Review.

May the Commonwealth of Massachusetts take by eminent domain a portion of an interstate railroad system where the property of the railroad is within the jurisdiction of a federal bankruptcy court pursuant to 11 U.S.C. § 205, without first obtaining the consent of that court?

Constitutional Provisions and Statutes.

United States Constitution.

Article I, sec. 8:

> "The Congress shall have Power To . . . regulate Commerce . . . among the several States . . . [and] To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States; . . ."

Article VI, cl. 2:

> "This Constitution, and the laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Bankruptcy Act, sec. 77, 11 U.S.C. § 205.

Paragraph (a):

> "Any railroad corporation may file a petition stating that it is insolvent or unable to meet its debts as they mature and that it desires to effect a plan of reorganization. The petition shall be filed with the court in whose territorial jurisdiction such corporation, during the preceding six months or the greater portion thereof, has had its principal executive or operating office, and a copy of the petition shall at the same time be filed with the Interstate Commerce Commission (hereinafter called the 'Commission'): . . . Upon the filing of such a petition, the judge shall enter an order either approving it as properly filed under this section, if satisfied that such petition complies with this section

and has been filed in good faith, or dismissing it, if he is not so satisfied. *If the petition is so approved, the court in which such order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located,* and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose. . . ." (Emphasis added.)

Paragraph (d):

"The debtor, after a petition is filed as provided in subsection (a), shall file a plan of reorganization within six months of the entry of the order by the judge approving the petition as properly filed, or if heretofore approved, then within six months of the effective date of this Act, and not thereafter unless such time is extended by the judge from time to time for cause shown, no single extension at any one time to be for more than six months. Such plan shall also be filed with the Commission at the same time. Such plans may likewise be filed at any time before, or with the consent of the Commission during, the hearings hereinafter provided for, by the trustee or trustees, or by or on behalf of the creditors being not less than 10 per centum in amount of any class of creditors, or by or on behalf of any class of stockholders being not less than 10 per centum in amount of any such class, or with the consent of the Commission by any party in interest. After the filing of such a plan, the Commission, unless such plan shall be considered by it to be prima facie impracticable, shall, after due notice to all stockholders

and creditors given in such manner as it shall determine, hold public hearings, at which opportunity shall be given to any interested party to be heard, and following which the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the Commission shall state fully the reasons for its conclusions.

"The Commission may thereafter, upon petition for good cause shown filed within sixty days of the date of its order, and upon further hearings if the Commission shall deem necessary, in a supplemental report and order modify any plan which it has approved, stating the reasons for such modification. The Commission, if it approves a plan, shall thereupon certify the plan to the court together with a transcript of the proceedings before it and a copy of the report and order approving the plan. No plan shall be approved or confirmed by the judge in any proceeding under this section unless the plan shall first have been approved by the Commission and certified to the court."

Paragraph (e):

"Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treat-

ment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

"If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the pro-

ceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received. If the proceedings are referred back to the Commission, it shall proceed to a reconsideration of the proceedings under the provisions of subsection (d) hereof. If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) hereof, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge: . . . The expense of such submission shall be certified by the Commission and shall be borne by the debtor's estate. The Commission shall certify to the judge the results of such submission.

"Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and

that such acceptances have not been made or procured by any means forbidden by law: . . .

"If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts."

Paragraph (o):

"The trustee or trustees, from time to time, shall determine what lines or portions of lines of railroad and what other property of the debtor, if any, should be abandoned or sold during the pendency of the proceedings in the interest of the debtor's estate and of ultimate reorganization but without unduly or adversely affecting the public interest, and shall present to the judge petitions, in which other parties in interest may join, for authority to abandon or to sell any such property; and upon order of the judge made after a hearing pursuant to such reasonable notice by publication or otherwise as the judge may direct to parties in interest, authorizing any such abandonment or sale, but only with the approval and authorization of the Commission when required by the Interstate Commerce Act as amended February 28, 1920, or as it may be here-

after amended, the trustee or trustees shall take all steps and carry out all proceedings necessary for the consummation of any such abandonment or sale in accordance with the order of the judge. Any such order of the judge shall be a final order for the purposes of appeal. The judge may order and decree any sale of property, whether or not incident to an abandonment, under this subsection at public or private sale and subject to or free from liens. The proceeds derived from any such sales shall be received by the trustee or trustees subject, in case the property was sold free from lien, to any liens thereon at the time of sale, and shall be applied or disposed of in such manner as the judge by further order shall direct. The expense of such sale shall be borne in such manner as the judge may determine to be equitable. The judge may order the trustee or trustees of the debtor to deposit such proceeds with any mortgage trustee entitled thereto, to be applied in payment of all or part of such mortgage."

INTERSTATE COMMERCE ACT, SEC. 1 (18), 49 U.S.C. § 1(18).

". . . no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. . . ."

MASSACHUSETTS GENERAL LAWS (TER. ED.).

Chapter 160, sec. 6:

"This chapter and chapter one hundred and fifty-nine shall not impair the rights of the commonwealth

as assets or reserve in previous statutes, and the commonwealth may, at any time during the continuance of the charter of a railroad corporation after the expiration of twenty years from the opening of its railroad for use, purchase of the corporation its railroad and all its franchise, property, rights and privileges by paying therefor such amount as will reimburse to it the amount of capital paid in, with a net profit thereon of ten per cent a year from the time of the payment thereof by the stockholders to the time of the purchase."

Chapter 160, sec. 7:

"The commonwealth may, at any time after one year's written notice to a railroad corporation, take its railroad, franchise and other property by eminent domain under chapter seventy-nine."

Statement of the Case Containing the Facts Material to the Consideration of the Questions Presented.

By its complaint filed September 12, 1966, the Commonwealth sought a declaratory judgment of the United States District Court for the District of Massachusetts that the Commonwealth could take by eminent domain a segment of the right of way of the Boston and Providence Railroad Corporation without obtaining the prior consent of the bankruptcy court having jurisdiction over the railroad's reorganization. The complaint was brought against the Trustee of the Boston and Providence (App. pp. 47-50). Shortly after the filing of the complaint, the Massachusetts Bay Transportation Authority was granted leave to intervene as a party plaintiff (App. p. 53), and on February 6, 1967, the District Court granted the motion of the Boston and Providence Trustee to add as parties defendant

the Trustees of the New York, New Haven and Hartford Railroad Company (App. p. 54).

Defendants, in their responsive pleadings, raised a number of affirmative defenses in addition to the issue set forth in the complaint. These were that the prior approval of the Interstate Commerce Commission and of the Massachusetts Department of Public Utilities was required before the Commonwealth could proceed to effect the proposed taking, and that the proposed taking was not authorized under Massachusetts law (App. pp. 55-58). The New Haven Trustees also raised the question of whether the consent of the reorganization court having jurisdiction over the New Haven was also a prerequisite to any such taking (App. p. 64).

An agreed statement of facts was filed, and is reprinted at pages 72 through 77 of the Appendix.

The property the Commonwealth seeks to take by eminent domain is owned in fee by the Boston and Providence Railroad, which has been in reorganization in the District Court for the District of Massachusetts since 1938. At the present time a plan of reorganization has been approved by the court, *In the Matter of Boston & Providence Railroad Corp.*, 260 F. Supp. 415 (D. Mass. 1966), appeal dismissed for want of prosecution, March 29, 1967.

Subsequent to the opinion of the Court of Appeals, the creditors holding more than two-thirds in amount of the total allowed claims and the stockholders holding more than two-thirds of the stock of the Boston and Providence voted to approve the plan (see 11 U.S.C. § 205(e), and copy of letter dated January 2, 1968, from Charles W. Mulcahy, Jr., *et al.*, to the Interstate Commerce Commission) (App. pp. 78-79).

Under the plan, all of the right of way, including the segment sought to be condemned, is to be conveyed to the New

York, New Haven & Hartford Railroad. All of this right of way is presently used for railroad purposes by the New Haven in accordance with section 77(c)(6) of the Bankruptcy Act, and the plan contemplates that it will continue to be so used.

The New Haven operated the Boston and Providence right of way under lease from 1893 until 1935, when reorganization proceedings were commenced in the United States District Court for the District of Connecticut. The lease ran from the Old Colony Railroad Company, which in turn had leased the property from Boston and Providence some five years earlier. In accordance with appropriate court orders, the reorganization Trustees in 1935 rejected the leases, and at the same time the New Haven reorganization court ordered continued operation of the Boston and Providence by the New Haven in accordance with section 77(c)(6) of the Bankruptcy Act. (App. p. 72).

In 1961 the present reorganization proceedings of the New Haven were commenced in the United States District Court for the District of Connecticut. The operation of the Boston and Providence by the present New Haven Trustees was further ordered by the present New Haven reorganization court (App. p. 73).

The portion of the Boston and Providence right of way which the Commonwealth seeks to take runs south from Boston about 7 miles and has two shorter lines of the New Haven and various sidings running off it (App. p. 36). It extends from a point near Ruggles Street in Boston, Massachusetts, to a point in the vicinity of Hyde Park. It is operated by the New Haven Trustees as an integral part of the New Haven's interstate and intrastate railroad system. The property involved is utilized for the movement of substantial amounts of mail and express traffic, and for

the transportation of a large number of passengers (App. p. 75). The plan of reorganization requires the transfer of the right of way by the Boston and Providence to the New Haven, and the continued operation of it by the New Haven. All of the parties agree that the taking by the Commonwealth would, if effected, result in the complete termination of all railroad operations over the segment of the right of way involved (App. p. 76).

All parties filed motions for summary judgment. On April 28, 1967, the United States District Court entered a judgment reading as follows:

> "After hearing on the motions for summary judgment filed by the plaintiffs and the defendants, and in accordance with this Court's Opinion dated April 13, 1967 it is hereby ordered that judgment is entered declaring that before making the proposed taking of the property of the Boston and Providence Railroad Company the plaintiffs must secure the authorization and approval of the Interstate Commerce Commission and of this Court."

The District Court addressed itself to only two of the issues raised by the pleadings, those relating to the jurisdiction of the Boston and Providence reorganization court and of the Interstate Commerce Commission. The District Court expressly said that it was leaving the issues with respect to Massachusetts law for determination in a proper proceeding in the state courts (App. p. 34). It also exercised its discretion by not addressing itself to the question of the New Haven reorganization court's jurisdiction.

The Commonwealth of Massachusetts and the Massachusetts Bay Transportation Authority appealed from the aforesaid final judgment to the Court of Appeals for the First Circuit.

The appeal was heard by the Court of Appeals, which, on November 8, 1967, entered an opinion (App. pp. 35-41). As stated in the opinion, at the opening of their argument the appellants waived their appeal as to that part of the judgment of the District Court which required the Commonwealth to obtain first the consent of the Interstate Commerce Commission before attempting to take the property by eminent domain (App. p. 35). This left for decision only the question of the correctness of that part of the judgment of the District Court requiring the Commonwealth to obtain first the consent of that court, in which the Boston and Providence Railroad is in reorganization, before attempting to take the property by eminent domain.

The Court of Appeals amended the judgment of the District Court by striking out the last four words thereof, "and of this court," thus holding that the prior consent of the District Court was not required (App. p. 41). This petition for certiorari is for the purpose of reviewing the correctness of this ruling by the Court of Appeals.

Reasons for Granting the Writ.

I. The Decision of the Court of Appeals for the First Circuit in This Case is in Direct Conflict with Decisions in the Fourth and Eighth Circuits.

The holding of the Court of Appeals in this case that the state eminent-domain proceedings can go forward without the consent of the federal bankruptcy court is in direct conflict with the holding of *Chicago, Rock Island & Pacific Railroad Co.* v. *City of Owatonna,* 120 F. 2d 226 (8th Cir. 1941). The facts in the *Owatonna* case were almost identical to those in this case. The City of Owatonna, Minnesota, by virtue of its eminent-domain power, was attempting to take

a tract of land belonging to the Chicago, Rock Island & Pacific Railroad Co., a railroad in reorganization under section 77 of the Bankruptcy Act. The railroad sought to enjoin the state condemnation proceedings. As the Court of Appeals for the Eighth Circuit viewed the case:

> "This situation presents a clear cut issue as to whether permission of the bankruptcy court was essential to the validity of the condemnation proceedings." 120 F. 2d at 227.

After discussing the broad powers of the bankruptcy court with respect to the property of the debtor, the Eighth Circuit court concluded:

> "[The] consent of the bankruptcy court [is] a jurisdictional prerequisite to initiation and conduct of this condemnation proceeding . . ." 120 F. 2d at 227.

As well as conflicting with the *Owatonna* case, the decision in the instant case conflicts with the decision in *Buckhannon & Northern Railroad Co.* v. *Davis,* 135 F. 707 (4th Cir. 1905). In that case the Parkersburg Branch Railroad Company was in reorganization and a receiver of all the property of the railroad had been appointed by the federal court. During the proceeding involving the receivership, the Buckhannon & Northern Railroad Co., acting under the authority granted it by the state of West Virginia, attempted to take by eminent domain some properties of the Parkersburg Railroad without obtaining permission of the federal court in which the receivership proceedings had been started. The Parkersburg Railroad Company sought to enjoin the Buckhannon & Northern Railroad from prosecuting its suit for condemnation in the state court. The Court of Appeals for the Fourth Circuit held

that the state condemnation proceedings could not go forward without the consent of the federal court. As the court saw the issue—

> ". . . the court is called upon to decide whether the facts in this case entitle the petitioner to institute suit against the receiver without permission of the court." 135 F. at 710.

The court concluded that permission of the federal court was clearly required, stating:

> "The property being in the hands of the court of administration, such court is entitled in the first instance to pass upon the question whether the receiver shall part with a portion of it, and as to whether a compensation for the taking of the same is adequate; otherwise the policy of the law in relation to the appointment of receivers would be defeated." 135 F. at 711.

While the *Buckhannon* case was decided before the enactment of section 77 of the Bankruptcy Act, it is equally in point here since section 77 grants federal bankruptcy courts all the powers of a federal court in a receivership in equity.

The holdings of both the *Owatonna* and the *Buckhannon* cases are in direct conflict with the holding of the Court of Appeals for the First Circuit in the present case, and a resolution of the issue by this Court is clearly required.

II. The Case Presents an Important Question of Federal Law which was Decided Incorrectly by the Court of Appeals and which should be Resolved by This Court.

A. The Opinion of the Court of Appeals is Contrary to the Statutory Mandate Giving the District Court Exclusive Jurisdiction of the Property of a Railroad in Reorganization.

Section 77 of the Bankruptcy Act, 11 U.S.C. § 205, deals with the reorganization of railroads engaged in interstate commerce. Paragraph (a) provides, *inter alia,* that—

> "If the petition [for reorganization] is so approved [by the court], *the court in which such order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located,* and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose. . . ." (Emphasis added.)

The scope of the jurisdiction of a federal bankruptcy court presents an important question of federal bankruptcy law which has been passed on by this Court on many occasions. It is a well-established principle often enunciated by this Court that the exclusive jurisdiction granted to federal bankruptcy courts by Congress empowers those courts generally to deal with all matters affecting the estate of the bankrupt railroad. This is true whether the claims against the property of the bankrupt railroad are asserted by private parties or by states and their agencies. Thus, in *Gardner* v. *New Jersey,* 329 U.S. 565 (1947), this Court

ruled that state tax liens against a railroad in reorganization could not be asserted without the approval of the reorganization court. In reaching this conclusion this Court stated:

> "It is the exclusive jurisdiction of the reorganization court which gives it power to preserve the railway as a unit and as a going concern and to prevent it from being divided up and dismembered piecemeal. Only in that way can the continuous operation of the road be assured and a plan of reorganization be effected which not only safeguards the interests of the various claimants but is also compatible with the public interest. [Citing cases.]
>
> "When §77 is read against this historical background and in light of practical requirements, we cannot conceive that Congress gave the reorganization court power less replete than the sweeping language of §77 suggests." 329 U.S. at 577-578.

Similarly, in *Ex parte Baldwin*, 291 U.S. 610 (1934), this Court held that, because of the grant of exclusive jurisdiction to the federal bankruptcy court, state-court proceedings involving contract claims against the railroad in reorganization would not be allowed to go forward. See also *Continental Illinois Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Railroad Co.*, 294 U.S. 648 (1935). Only with respect to purely intrastate and local matters has this Court allowed state regulatory agencies to encroach on the exclusive jurisdiction granted the federal bankruptcy court. *Palmer* v. *Massachusetts*, 308 U.S. 79 (1939).

The power of the federal bankruptcy court to control state eminent-domain proceedings which interfere with the reorganization is well established. *Chicago, Rock Island & Pacific Railroad Co.* v. *City of Owatonna, supra.* See *Buck-*

hannon & Northern Railroad Co. v. *Davis, supra.* This authority in the District Court is necessary for the formulation and consummation of an adequate plan of reorganization.

A railroad reorganization is of necessity a complex and lengthy procedure. The reorganization in the present case has been under way for thirty years. Obviously it would fly in the face of the purpose of the federal legislation involving the intricate problems of railroad reorganization to allow a state eminent-domain taking to disrupt and frustrate the plan of reorganization worked out over a number of years through the co-operation of the Interstate Commerce Commission and the federal bankruptcy court. The very purpose of the exclusive jurisdiction of the federal court is to hold in abeyance all actions which could interfere with the formulation and consummation of the plan of reorganization.

The case of *United States* v. *New York, N.H. & H. R.R.*, 348 F. 2d 151 (1st Cir. 1965), much relied on by the Court of Appeals below, is clearly not controlling here. As stated by the Court of Appeals in its opinion in the instant case, the property taken in the *New Haven* case *"was a small piece of land not used for railroad purposes. No contention was made that the taking interfered with the reorganization* or should not be effected . . . The trustees conceded in their brief that in the reorganization court they 'would not oppose the granting of permission' to have the actual trial in the local district. . . ." (App. p. 37.) (Emphasis added.) In the present case, the state's exercise of its power of eminent domain would make inoperative the reorganization plan already approved by the bankruptcy court and by creditors and stockholders.

It is no answer to assert, as did the Court of Appeals, that, since the bankruptcy court's power is limited to the

pendency of the bankruptcy proceedings, it would serve no purpose to allow the court to prevent a state eminent-domain taking, since the taking could commence as soon as the railroad was out of reorganization. The fact that the court's power is limited in time does not make it any less effective during the actual period of reorganization.*

As well as limiting the bankruptcy court's jurisdiction under section 77(a), the holding of the Court of Appeals erroneously deprives the District Court of its general power of review under section 77(e). See *Ecker* v. *Western Pacific R. Corp.*, 318 U.S. 448, 475, 477 (1942).

The decision of the Court of Appeals below restricting and limiting the power of the federal bankruptcy court clearly presents an important question of federal bankruptcy law. Its resolution by the Court of Appeals is "substantially out of line" with the decided cases and warrants the issuance of a writ of certiorari by this Court. *Braen* v. *Pfeifer Oil Transportation Co., Inc.*, 361 U.S. 129, 130 (1959).

B. The Court of Appeals has Disregarded the Provisions of Section 77(o) of the Bankruptcy Act.

It was agreed by the parties below that the proposed taking by the Commonwealth would, if effected, result in the complete termination of all railroad operation over the segment of the right of way involved (App. p. 76). This would include the two connecting lines and the sidings.

*It should be noted that, even after the reorganization is completed, there remains a serious question as to whether Massachusetts could take the portion of right-of-way here at issue. Massachusetts General Laws, chapter 160, sections 6 and 7, grant the Commonwealth the power to take by eminent domain *all* the property of a railroad. There is no statutory provision, however, for the taking of part of the roadbed of the railroad.

There can be no question that such a result would constitute an abandonment of the segment of the right of way even though it would not be voluntary on the part of the trustee.

Congress expressly provided a statutory procedure to be followed in cases of abandonment: Section 77(o) of the Bankruptcy Act (11 U.S.C. § 205(o)) provides:

> "The trustee or trustees, from time to time, shall determine what lines or portions of lines of railroad and what other property of the debtor, if any, should be abandoned or sold during the pendency of the proceedings in the interest of the debtor's estate and of ultimate reorganization but without unduly or adversely affecting the public interest, and *shall present to the judge petitions,* in which other parties in interest may join, *for authority to abandon or to sell any such property; and upon order of the judge* made after a hearing pursuant to such reasonable notice by publication or otherwise as the judge may direct to parties in interest, *authorizing any such abandonment or sale,* but only with the approval and authorization of the Commission when required by chapter 1 of Title 49, as amended February 28, 1920, or as it may be hereafter amended, *the trustee or trustees shall take all steps and carry out all proceedings necessary for the consummation of any such abandonment or sale in accordance with the order of the judge.* Any such order of the judge shall be a final order for the purposes of appeal. The judge may order and decree any sale of property, whether or not incident to an abandonment, under this subsection at public or private sale and subject to or free from liens. . . ." (Emphasis added.)

Properly interpreted, section 77(o) should not be restricted to a voluntary petition by a trustee for sale or

abandonment, since it is the *effect* of the removal of property from the railroad which Congress has decreed that the court should consider, and this is wholly unrelated to the *cause* of such removal. Where, as in the instant case, a state eminent-domain taking would precipitate an abandonment, the means to secure compliance with the required statutory procedure is available to the Commonwealth. If the Trustee denied the Commonwealth's request to file a petition for abandonment, the Commonwealth could file a petition in the reorganization court praying that court to direct the Trustee to seek the court's authority to abandon the right of way. See *Bankers Trust Co.* v. *Gebhart*, 195 F. 2d 238 (2d Cir. 1952).

Under such a procedure section 77(o) gives the judge final authority on the question of whether the property should be abandoned "in the interest of the debtor's estate and of ultimate reorganization but without unduly or adversely affecting the public interest . . . with the approval and authorization of the Commission when required by the Interstate Commerce Act . . . ," and "the trustee shall take all steps and carry out all proceedings necessary for the consummation of any such abandonment . . . *in accordance with the order of the judge.*" (Emphasis added.)

To permit the taking of railroad property without requiring the reorganization court to make a judgment on the effect of the removal of such property from the estate would thus directly contravene the mandate of section 77(o). Conflicting opinions have been rendered as to the scope of the reorganization court's proper considerations under this section, particularly as to whether the court should consider the question of "public interest."* But, despite a

*The specific language of section 77(o) clearly requires the bankruptcy court to pass on the Trustee's determination of the effect on the public interest, and this would seem particularly necessary in situations where the Interstate Commerce Act did not call for

lack of unanimity as to the scope of the court's jurisdiction in this respect, it is abundantly clear that this section does, to a greater or lesser degree, require review and authorization of the court where a sale or abandonment of property is involved. Where a sale of property would *not* constitute an abandonment under 49 U.S.C. 1 (18), so that under section 77(o) a determination of the Interstate Commerce Commission is not called for, the power to order the sale lies with the District Court alone. The decision of the Court of Appeals ignores the role required of the District

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Commission approval. However, it was found in *In re Fonda, J. & G. R. Co.*, 95 F. 2d 397 (2d Cir. 1938), that the District Court's jurisdiction was more limited. Speaking for the court, Judge Swan found that implicit in the language of section 77(o) was a requirement for a consideration of the issues by state regulatory authorities, and that this sufficiently protected the public interest without the necessity of the reorganization court to make the same determination. It was held that "the District Judge need only consider the financial advantages or disadvantages to the debtor corporation's estate . . ." (95 F. 2d at 400). It should be noted that the following year Judge Swan, dissenting in *Converse* v. *Commonwealth of Massachusetts*, 101 F. 2d 48 (2d Cir. 1939), took pains to state that he now believed his interpretation of section 77(o) in *Fonda* as requiring the approval of state regulatory authorities to be incorrect, and that the issue had not even been presented by the case. The holding of the *Fonda* case with regard to the reorganization court's scope of authority under section 77(o) was explicitly rejected in *In re Denver & R.G.W.R. Co.*, 32 F. Supp. 244 (D. Col. 1940), which held that the court should consider both the financial aspects and the public interest. As a practical matter, it would seem that the question of public interest cannot be entirely divorced from the financial considerations for purposes of the court's determination. Faced with the *Fonda* decision limiting his scope of authority, the district judge in *In re Long Island R. Co.*, 92 F. Supp. 85 (E.D. N.Y. 1950), stated:

"I cannot resist observing that questions of financial advantage and disadvantage are inextricably interwoven with questions of public convenience and necessity, which, as I understand the language of the Court of Appeals [in *Fonda*], I am instructed not to touch." 92 F. Supp. at 91.

Court by section 77(o), and constitutes an erroneous construction of the statute which should be rectified.

Even if section 77(o) were construed as not applying in a situation where an eminent-domain taking of railroad property is involved, the section nevertheless reflects a Congressional policy as to the general scope of the bankruptcy court's jurisdiction under section 77 as a whole. The imposition upon the court by section 77(o) of a duty to pass upon the interests of the debtor's estate and the public clearly embodies the intent of Congress with respect to the court's authority, and must be taken as indicative of the extent of the court's exclusive jurisdiction under section 77(a). Section 77, therefore, should not be given the inconsistent interpretation of requiring the reorganization court to make a determination of the effect of a sale or abandonment of property where the Trustee has initiated the action, but having no authority whatsoever where the action is initiated by others. Indeed, a judicial review of a transaction which does not have the sanction of the Trustee would seem clearly more necessary than a review of a transaction which the Trustee, the guardian of the debtor's estate, initiates because he believes it to be beneficial to the estate.

Certiorari should be granted to settle the important question of whether the reorganization court is required by the terms of section 77(o) or by the policy reflected therein to consider the propriety of an eminent-domain taking of railroad property.

C. The Decision of the Court of Appeals is Contrary to the Supremacy Clause of the United States Constitution.

In its opinion the Court of Appeals analyzes the authority of the District Court in reorganization proceedings and concludes that jurisdiction is limited to the economic aspects of the reorganization, the question of public interest in the operation of the railroad being beyond its proper concern. Accordingly, the court concludes that the issue with which it is faced is to determine which of two conflicting interests must prevail—the state's power of eminent domain as expressed in the Massachusetts statutes or the jurisdiction over the economic aspects of reorganization given to the District Court by the Bankruptcy Act. In response to this question, the court summarily dismisses the square holding of *Chicago R.I. & P. Ry.* v. *City of Owatonna, supra,* and, finding no other relevant precedent, decides:

> "We must, accordingly, approach the problem as essentially one of first impression. In so doing we are led to the conclusion that it is the state's interest, and not that of a successful reorganization that must prevail if they are in conflict." (App. p. 39.)

In so holding, the Court of Appeals totally ignores the Supremacy Clause (art. VI, cl. 2) of the United States Constitution. The Bankruptcy Act was enacted pursuant to article I, section 8, clause 4, of the Constitution, which gives Congress the power "to establish uniform Laws on the subject of Bankruptcies throughout the United States; . . ." The Supremacy Clause states:

> "This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land; and the Judges

> in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The court attempts to justify its decision by a discussion of the social impact and significance of the respective state and federal interests, and concludes:

> "Even to the extent that there is a public interest in the preservation of the going business, this economic interest is inferior to the public interest which is the basis of the state's prescriptive rights." (App. p. 40.)

This language reflects a serious misconception of the Supremacy Clause if, in fact, its impact was considered at all. The Constitution sets forth a clear mandate as to the interest which must prevail in a situation of conflict. This mandate would be emasculated if in each case a court could make its own determination of which interest should prevail, based on the judge's opinion of the relative social merits involved. The Supremacy Clause is couched in absolute terms, and must be so applied. In this connection it was stated by this Court in *Franklin National Bank* v. *New York*, 347 U.S. 373 (1954):

> "There appears to be a clear conflict between the law of New York and the law of the Federal Government. We cannot resolve conflict of authority by our judgment as to the wisdom or need of either conflicting policy. The compact between the states creating the Federal Government resolves them as a matter of supremacy. However wise or needful New York policy, a matter as to which we express no judgment, it must give way to the contrary federal policy." 347 U.S. at 378.

It is hardly necessary to point out that no supremacy issue was involved in *United States* v. *New York, N.H. & H. R.R. Co., supra,* since the condemnation proceeding there was by the federal government pursuant to 40 U.S.C. 257, which gives to the executive branch the power to appropriate real estate for public purposes. The conflict was therefore between the executive and the judicial branches of the federal government, and not, as in the instant case, between federal and state statutes. Thus it was appropriate for the First Circuit to consider the relative social merits of the conflicting interests in the *New Haven* case; it was error to do so in the decision below.

Conclusion.

The petition for certiorari should be granted because—

1. The decision of the Court of Appeals is in conflict with the decisions of the Court of Appeals for the Eighth and Fourth Circuits respectively in the cases of *Chicago, Rock Island & Pacific Railroad Co.* v. *City of Owatonna,* 120 F. 2d 226 (1941), and *Buckhannon & Northern Railroad Co.* v. *Davis,* 135 F. 707 (1905).

2. The decision of the Court of Appeals concerns an important question of federal law which has not been, but should be, settled by this Court.

3. The decision of the Court of Appeals eliminating the necessity of the consent of the reorganization court is contrary to section 77(a) and section 77(o) of the Bankruptcy Act and to the Supremacy Clause in the United States Constitution.

Respectfully submitted,

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Appendix.

Opinion of United States District Court for the District of Massachusetts.

(April 13, 1967.)

FRANCIS J. W. FORD, District Judge.

This is an action for a declaratory judgment brought to resolve a controversy between the parties arising from the expressed intention of the plaintiff Commonwealth of Massachusetts acting in conjunction with intervenor Massachusetts Bay Transportation Authority to take by eminent domain certain real estate owned in fee by the Boston and Providence Railroad Company, for use in developing a transportation corridor. The basic facts have been stipulated by the parties.

Both the Boston and Providence Railroad Company and The New York, New Haven and Hartford Railroad Company are common carriers by railroad in interstate commerce subject to the provisions of the Interstate Commerce Act. Both of these railroads are currently in reorganization under § 77 of the Bankruptcy Act, 11 U.S.C. § 205, the Boston and Providence in this court and the New Haven in the United States District Court for the District of Connecticut.

The land which the Commowealth has announced its intention to acquire is a strip of land consisting of about seven miles of right of way in Boston. This land is owned by the Boston and Providence and the railroad line running over it formerly operated by the New Haven as lessee, is now being operated by the trustees of the New Haven under order of its reorganization court. This line is an integral part of the New Haven's interstate and intrastate railroad system. Two freight stations are located on this section of

the line. It carries a substantial volume of freight traffic, including shipments moving to or from private side tracks and public delivery tracks on or adjacent to the right of way. Substantial amounts of mail and express traffic are moved along this line as well as a large number of passengers. The line is used for suburban passenger trains operated under agreement between the New Haven and the Massachusetts Bay Transportation Authority and for interstate passenger trains operated under subsidy agreements between the New Haven, plaintiff Commonwealth and the State of Rhode Island. The Back Bay passenger station located on the line is used annually by thousands of passengers.

The taking of the real estate proposed by the Commonwealth would result in complete termination of all railroad operations over the right of way involved, including the elimination of all passenger service between Back Bay station and points to the south and west and elimination of the two freight stations on the line and of rail freight services to shippers and receivers on the private side tracks and public delivery tracks along the right of way.

The New Haven owns and now uses for freight operations another line (the Midland Division line) from South Station which connects with the main Boston to Providence line at Readville. Trains presently operated by the New Haven over the line which the Commonwealth proposes to take could be operated over the Midland Division line once it is properly modified and upgraded, a procedure which would entail the expenditure of substantial amounts of money.

Plaintiffs ask for a declaration that the consent of the United States District Court is not a jurisdictional prerequisite for the taking by the Commonwealth of the property involved. Defendants by way of counterclaim ask for a declaration that the Commonwealth's sole authority to

take railroad property by eminent domain is found in Mass. G.L. Ch. 160, § 7 which authorizes only the taking of all the railroad, franchises and other property, and that prior to any taking the Commonwealth must secure the authorization and approval of this court, the Interstate Commerce Commission and the Massachusetts Department of Public Utilities.

Section 77(e) of the Bankruptcy Act provides that during the pendency of the reorganization proceedings and for the purposes thereof, this court shall have exclusive jurisdiction of the debtor and its property wherever located. Under this section this court has the power to protect the property within its jurisdiction from interference by suits in other courts and the consent of this court is a jurisdictional prerequisite to the maintenance of any such action. Ex parte Baldwin, 291 U.S. 610, 54 S.Ct. 551, 78 L.Ed. 1020; Chicago, R. I. & P. Ry. Co. v. City of Owatonna, 8 Cir., 120 F.2d 226; Buckhannon & N. R. Co. v. Davis, 4 Cir., 135 F. 707, 710; United States v. Dorigan, D.C., 236 F.Supp. 106, 109.

Plaintiffs argue that United States v. New York, New Haven and Hartford R. Co., 1 Cir., 348 F.2d 151, is authority to the contrary. However, the decision in that case was confined to the narrow issue of resolving a conflict between two federal statutory provisions by holding that a proceeding by the United States to take property of a railroad in reorganization, by eminent domain, brought in conformity with 28 U.S.C. § 1403, did not require the consent of the reorganization court.

Plaintiffs' principal argument is that the power of eminent domain is an inherent attribute of state sovereignty, subject to no limitation by the federal government other than the constitutional requirements of due process and fair compensation. They cite in support of this the language in City of Cincinnati v. Louisville & Nashville Railroad Co.,

223 U.S. 390, 400, 32 S.Ct. 267, 268, 56 L.Ed. 481, where the court, speaking of the state's power of eminent domain, said, "It is a power not surrendered to the United States, and is untouched by any of the provisions of the Federal Constitution, provided there be due process of law; that is, a law authorizing it, and provision made for compensation." This can mean only that the Constitution contains no express provision limiting the exercise by the state of its power of eminent domain. It does not mean that this power of the state in cases of conflict must prevail over the powers of the federal government. Like other powers of the state it is subject to the supremacy clause, Constitution, Article VI, Clause 2, and the state's exercise of its power must yield when it conflicts with a paramount federal statute. Ormerod v. New York, West Shore and Buffalo R. Co., C. C., 13 F. 370, 372. Bankruptcy administration, including reorganization, is a paramount national function which takes precedence over conflicting provisions of the constitution or laws of any state. In re Chicago, Rock Island & Pacific Ry. Co., 7 Cir., 168 F.2d 587, 590, 594.

Under § 1(18) of the Interstate Commerce Act, 49 U.S.C. § 1(18), a railroad subject to the Act "shall not abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment." The taking and use of the property here involved would constitute an abandonment of the property taken and the operation thereof. The approval of the Commission is therefore required, even though the railroad is in reorganization, and even though the abandonment would be wholly involuntary on the part of the railroad or its trustee and caused solely by the intervening action of a third party. Smith v. Hoboken R., etc., Co., 328 U.S. 123, 130, 66 S.Ct. 947, 90 L.Ed. 1123; Thompson v. Texas Mexican R. Co.,

328 U.S. 134, 144, 66 S. Ct. 937, 90 L.Ed. 1132; In re Boston Terminal Co., D.C., 71 F.Supp. 472, 473.

This is not one of those cases involving only a slight change in track location having an unsubstantial effect upon the service and operations of the railroad where it has been held that a certificate from the Commission was not required. Missouri Pacific Railroad Company Trustee Constructions, 282 I.C.C. 388. The state's proposal here involves complete abandonment of a substantial trackage of the railroad, including one passenger and two freight stations, termination of services now offered to many shippers and receivers, and the substitution of service over a distinct line owned by another railroad. On its face this does not appear to be a situation where the Commission would hold that no certificate is required. In any event, it is the Commission and not the court which should pass upon that question in the first place. City of Des Moines, Iowa v. Chicago & North Western R. Co., 8 Cir., 264 F.2d 454.

The remaining questions raised by defendants' counterclaim involve questions of plaintiffs' powers and duties under Massachusetts statutes. Only the Massachusetts courts can give a final and authoritative construction of these statutes. As a matter of discretion this court should refrain from passing on these questions and let them remain for determination in a proper proceeding by the courts of the state. Alabama State Federation of Labor, etc. v. McAdory, 325 U.S. 450, 65 S.Ct. 1384, 89 L.Ed. 1725; Chicago v. Fieldcrest Dairies, 316 U.S. 168, 62 S.Ct. 986, 86 L.Ed. 1355.

Judgment will be entered declaring that before making the proposed taking of the property of the Boston and Providence Railroad Company the plaintiffs must secure the authorization and approval of the Interstate Commerce Commission and of this court.

Opinion of United States Court of Appeals for the First Circuit.

(November 8, 1967.)

ALDRICH, Chief Judge.

This appeal is from a declaratory judgment of the district court holding that appellant, the Commonwealth of Massachusetts, could not take by eminent domain certain railroad property in the "exclusive jurisdiction" of the district court by virtue of section 77 reorganization proceedings, 11 U.S.C. § 205, without first obtaining the consent of the Interstate Commerce Commission and the district court, neither of which had been sought. At the opening of the oral argument appellant waived its objections to the first of these rulings and expressly conceded the necessity of receiving the consent of the Commission. We consider, accordingly, only the other issue, except that we will observe that we believe appellant's concession to have been well-advised. 49 U.S.C. § 1(18). Cf. Thompson v. Texas Mexican Ry., 1946, 328 U.S. 134, 66 S.Ct. 937, 90 L.Ed. 1132; New Orleans Terminal Co. v. Spencer, 5 Cir., 1966, 366 F.2d 160, cert. denied, 386 U.S. 942, 87 S.Ct. 974, 17 L.Ed.2d 873. With respect to the public interest in interstate transportation, the federal government stands supreme.

The property involved is owned in fee by the Boston & Providence Railroad, which has been in reorganization in the district court for the District of Massachusetts since 1938. At the present time a plan of reorganization has been approved by the court, In re Boston & P.R.R., D.Mass., 1966, 260 F.Supp. 415, appeal dismissed for want of prosecution, March 29, 1967, and is being submitted to creditors and stockholders for confirmation. The property appellant seeks to condemn is part of a right of way which, under the plan, is to be transferred to the New York, New Haven & Hartford Railroad, a substantial creditor. All of this right

of way is presently used for railroad purposes by the New Haven in accordance with section 77(c) (6) of the Bankruptcy Act. The portion the Commonwealth wishes to take runs south from Boston about seven miles and has two shorter lines of the New Haven and various sidings running off it. The proposed taking would preclude a railroad operation. Appellee Bartlett is the trustee in reorganization of the Boston & Providence.

The district court asserted the need for its consent simply and succinctly,

> "Section 77(e) [*sic*] of the Bankruptcy Act provides that during the pendency of the reorganization proceedings and for the purposes thereof, this court shall have exclusive jurisdiction of the debtor and its property wherever located. Under this section this court has the power to protect the property within its jurisdiction from interference by suits in other courts and the consent of this court is a jurisdictional prerequisite to the maintenance of any such action." 266 F. Supp. at 392.
>
> "* * * Bankruptcy administration, including reorganization, is a paramount national function which takes precedence over conflicting provisions of the constitution or laws of any state." 266 F.Supp. at 393.

It is true that section 77(a) provides that the court shall have "exclusive jurisdiction of the debtor and its property wherever located, * * *" but the court failed, at least overtly, to consider the qualifying phrase, "during the pendency of the proceedings under this section and *for the purposes thereof,*" (emphasis ours). In view of this limitation its reference to bankruptcy as a "paramount national function" seems too easy an answer. Indeed, we have already held that where there is no sufficient purpose the

bankruptcy court's jurisdiction is not exclusive. United States v. New York, N.H. & H.R.R., 1 Cir., 1965, 348 F.2d 151. The court's distinguishing of this case on the ground that the eminent domain taking was there made by the federal government, so that the supremacy clause was not involved, did not go to the heart of the matter; our decision necessarily recognized that the jurisdiction of the bankruptcy court depended upon the need.

In the *New Haven* case the property taken was a small piece of land not used for railroad purposes. No contention was made that the taking interfered with the reorganization, or should not be effected. The question was whether the "exclusive possession" of the reorganization court meant that there was no independent jurisdiction in the district court of the district where the land was located. The trustees conceded in their brief that in the reorganization court they "would not oppose the granting of permission" to have the actual trial in the local district. We held they had no such concern; that the bankruptcy exclusivity was granted only for substantive and substantial purposes, and that none there existed. Correspondingly, the question in the case at bar is not resolved by pointing to the phrase "exclusive jurisdiction," but requires the much more difficult determination of whether it is within the purposes of section 77 that the state's power of eminent domain be suspended, or at least made subject to the control of the court, during the pendency of the reorganization proceedings.

The Commonwealth's concession that it cannot proceed without ICC consent focuses scrutiny upon the separate function of the bankruptcy court. The interest of the court in any reorganization is greater than appellant concedes, the prevention of diminution of assets and the achievement of an equitable adjustment among claimants. It has the further object of preserving the corporation as a going

concern. "[T]o prevent the attainment of that object is to defeat the very end the accomplishment of which was the sole aim of the section, and thereby to render its provisions futile." Continental Illinois Nat. Bank & Trust Co. of Chicago v. Chicago, Rock Island Ry., 1935, 294 U.S. 648, 676, 55 S.Ct. 595, 606, 79 L.Ed. 1110. However, to the extent that appellees suggest that, because this is a section 77 proceeding, "brigaded with the administrative process of the Commission," in which "the authority of the Court is intertwined with that of the Commission," Palmer v. Commonwealth of Massachusetts, 1939, 308 U.S. 79, 87, 60 S.Ct. 34, 38, 84 L.Ed. 93, the powers of the court are greater than in the usual reorganization proceeding, we must disagree. Insofar as this business is a railroad, affected by a special public interest, this special interest is the concern of the ICC, and not of the court. Ecker v. Western Pacific R.R., 1943, 318 U.S. 448, 473, 63 S.Ct. 692, 87 L.Ed. 892; R.F.C. v. Denver & R.G.W.R.R., 1946, 328 U.S. 495, 508-509, 66 S.Ct. 1282, 1384, 90 L.Ed. 1400. In fact, "[w]hen examined to learn the purpose of its enactment, section 77 manifests the intention of Congress to place reorganization under the leadership of the Commission, subject to *a degree of participation* by the court." Ecker v. Western Pacific R.R., supra, 318 U.S. at 468, 63 S.Ct. at 705 (emphasis ours). If the court has any function in this particular, see In re Florida East Coast Ry., S.D.Fla., 1949, 81 F.Supp. 926, it is merely one of review to ascertain that constitutional and statutory mandates have been followed and that there is "material evidence" to support the Commission's conclusions. R.F.C. v. Denver & R.G.W.R.R., supra, 328 U.S. at 509, 66 S.Ct. at 1290. Even in the case of the abandonment of a part of the railroad operation at the behest of the trustee under section 77(*o*), the court's only concern is with the economic effect upon the reorganization, and is not with the consequence to public transportation. In re Fonda, J.

& G.R.R., 2 Cir., 1938, 95 F.2d 397. Indeed, where there is overlapping of functions, it is the ICC that passes upon the financial aspects of the reorganization, rather than the bankruptcy court that passes upon the public interest aspects. Ecker v. Western Pacific R.R., supra; R.F.C. v. Denver & R.G.W.R.R., supra; Thompson v. Texas Mexican Ry., supra.

Accordingly, the question comes whether the bankruptcy court's general interest in successful reorganizations was intended by Congress to be paramount to a state exercise of the right of eminent domain, for if not, there can be no independent power in the court to refuse to consent. On this question appellant is able to offer no assistance, except to point out that its right to take property for public use is one of great importance, and not readily subordinated. City of Cincinnati v. Louisville & N.R.R., 1912, 223 U.S. 390, 400, 32 S.Ct. 267, 56 L.Ed. 481; State of Georgia v. City of Chattanooga, 1924, 264 U.S. 472, 480, 44 S.Ct. 369, 68 L.Ed. 796. Appellees do furnish one judicial decision, Chicago, R.I. & P. Ry. v. City of Otawanna, 8 Cir., 1941, 120 F.2d 226, where the court held that the city seeking to condemn property in accordance with a grant of authority in its charter, could not take property which had passed into the hands of trustees under section 77 without the consent of the bankruptcy court. The opinion offers little assistance, however, as it does no more than assert the conclusion of exclusivity of bankruptcy jurisdiction.

Nor have we been able to find any legislative history casting light upon the question. We must, accordingly, approach the problem as essentially one of first impression. In so doing we are led to the conclusion that it is the state's interest, and not that of a successful reorganization that must prevail if they are in conflict.

It is obvious, at the outset, that the state is not here in the position of a creditor. It is not seeking to enforce an

existing mortgage, tax lien, Gardner v. State of New Jersey, 1947, 329 U.S. 565, 67 S.Ct. 467, 91 L.Ed. 504, or other such interest which would qualify as a "claim" against the debtor's property under section 77(b), and therefore be subject to alteration or modification in the course of approving a plan under that section. Rather, it possesses a special inchoate interest or right, which is paramount to any interest of the debtor in the property. This is nothing the debtor ever had, or that it, or the court, could convey, qualify, or subordinate to any other claim or interest. There is, as we held in the *New Haven* case, not even a bankruptcy function to determine fair compensation. In sum, with respect to the state's prescriptive rights the court could effect none of the alterations or take any of the actions ordinarily contemplated in a reorganization proceeding. At the most, it could order the state not to proceed. Moreover, the prohibition would be no more than a postponement. The moment the court relinquishes jurisdiction its power is terminated; there can be no prospective prevention. Accordingly, if the state must apply to the court, and the court were to conclude that the proposed exercise of eminent domain would cripple the reorganization, the lethal blow may be diverted from the egg, but it will fall upon the day-old chick at the state's pleasure.

Under such circumstances it is difficult to imagine how giving the bankruptcy court a temporary veto would serve the "purposes" (§ 77(a)) of the reorganization. But even if, in some fashion we do not perceive, this could be thought to benefit the debtor, we must hold that it is not the bankruptcy purpose that is paramount. Even to the extent that there is a public interest in the preservation of the going business, this economic interest is inferior to the public interest which is the basis of the state's prescriptive rights. The present reorganization has been, as we have noted, in progress for 29 years. The possibility that a bankruptcy

court could be permitted to postpone public rights for such a period is not appealing. Rather, we believe that to accept appellees' position, apart from the protection preserved to the ICC, would not viably improve the prospects of the estate and would be broadly improvident.

The judgment of the District Court is amended by striking out the last four words thereof, "and of this Court," and is otherwise affirmed. No costs.

Judgment of the United States Court of Appeals for the First Circuit.

November 8, 1967

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel appellant in Case 6946 submitting on its brief and the oral argument in Case 6940.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is amended by striking out the last four words thereof, "and of this Court," and is otherwise affirmed. No costs.

By the Court:

ROGER A. STINCHFIELD

By /s/ Dana H. Gallup

Chief Deputy Clerk.

Docket Entries in the United States District Court.

Date 1966		*Proceeding*
September 12	1.	Complaint filed.
September 12	2.	Summons issued.
October 11	3.	Motion to intervene as a plaintiff, filed.
October 11	4.	Certificate of service, filed.
October 11	5.	Complaint filed—order.
October 14		Summons returned by Marshal, September 13, 1966, filed.
September 30	6.	Motion of defendant for extension of time to file answer or otherwise plead to and including the date of November 1, 1966, assented to, filed.
September 30		Ford, D.J. Motion allowed by consent. Notices to counsellors R. L. Seegel, Asst. Atty. General and Charles W. Mulcahy, Jr.
October 24		Appearance of Joseph W. Bartlett, Esq., for defendant filed.
October 24		Ford, D.J. Hearing on Motion to intervene as plaintiff, motion allowed.
November 14	7.	Motion to dismiss counterclaim, filed by plaintiff.
November 29	8.	Answer and counterclaim of defendant, Charles W. Bartlett, Trustee, filed.
November 29		Ford, D.J. Order of Court re discovery issued—copies to all counsel.
December 29	9.	Plaintiff's motion for summary judgment filed.
1967		
February 3	10.	Appearance of Benjamin H. Lacy, Esq., Messrs. Nutter, McClennen & Fish for Boston and Providence R.R.

		Corp., stockholders committee, filed (Appearance signed by Robert S. Gulick, Esq. for B. H. Lacey, Esq.,) Ford, D.J.
February 6		Hearing on motion to add additional party respondent—(Trustees of the New York, New Haven and Hartford Railroad Co., ("New Haven") motion allowed.
February 28		Marshal's return of service or writ—N.Y.N.H. & H.R.R. Co., February 8, 1967, filed.
February 28	11.	Answer and counterclaim of defendants Richard Joyce Smith and William J. Kirk, Trustees filed.
February 28		Ford, D.J. Order of Court re discovery issued—notices to all counsel.
March 1	12.	Defendant Charles W. Bartlett's motion to dismiss complaint filed.
March 1	13.	Defendant Charles W. Bartlett's motion for summary judgment, filed.
March 2	14.	Motion of defendants Richard Joyce Smith and William J. Kirk trustees for summary judgment filed.
March 2	15.	Motion of defendants Richard Joyce Smith and William J. Kirk, Trustees to dismiss the complaint, filed.
March 10	16.	Motion of the Comm. of Massachusetts to dismiss counter claim of the defendants Richard Joyce Smith and William J. Kirk, Trustees, filed.
March 13		Ford, D.J. Hearing on plaintiff's motion to dismiss counterclaim, advisement.

Marc' 13	Ford, D.J. Hearing on plaintiff's motion for summary judgment, advisement.
March 13	Ford, D.J. Hearing on defendant Charles W. Barflett's motion for summary judgment, advisement.
March 13	Ford, D.J. Hearing on defendant Charles W. Bartlett's motion to dismiss complaint, advisement.
March 13	Ford, D.J. Hearing on Motion of defendants Richard Joyce Smith and William J. Kirk trustees for summary judgment, advisement.
March 13	Ford, D.J. Hearing on of defendants Richard Joyce Smith and William J. Kirk Trustees to dismiss complaint, advisement.
March 13	Ford, D.J. Hearing on motion of the Commonwealth of Massachusetts to dismiss counterclaim of the defendants Richard Joyce Smith and William J. Kirk, Trustees, advisement.
March 13	Agreed statement of facts, filed—briefs to be filed in or before 3/20/67.
March 17	Brief of the Commonwealth of Massachusetts in support of its motion for summary judgment and motion to dismiss counterclaims, filed.
March 17	Brief for the intervenor Massachusetts Bay Transportation Authority, filed.
March 17	Memorandum of R. J. Smith and William J. Kirk, trustees of the property of the N.Y.N.H. & H.R.R. Co., debtor, in support of their motions for summary judgment and to dismiss filed.

March 17	Memorandum of law in support of defendant Charles W. Bartlett's motion to dismiss complaint and motion for summary judgment filed.
April 4	Reply brief for the intervenor Massachusetts Bay Transportation Authority, filed.
April 13	Ford, D.J. OPINION:—Judgment will be entered declaring that before making the proposed taking of the property of the Boston and Providence Railroad Co. the plaintiffs must secure the authorization and approval of the Interstate Commerce Commission and of this Court. Copies to all counsel.
April 26	Stenographic record of Court Reporter dated March 13, 1967, filed.
April 28	Ford, D.J. Judgment:—After hearing on the motions for summary judgment filed by the plaintiffs and defendants, and in accordance with this court's opinion dated April 13, 1967, it is hereby Ordered that judgment is entered declaring that before making the proposed taking of the property of the Boston and Providence Railroad Co. the plaintiffs must secure the authorization and approval of the Interstate Commerce Commission and of this court. Judgment entered copies to all counsel.
May 8	Plaintiff's Commonwealth of Massachusetts notice of Appeal, filed. Copy to counsel.

May 8	Appeal bond in the amount of $250.00 with Aetna Insurance Company as surety, filed.
May 15	Plaintiff Mass. Bay transportation Authority's Notice of Appeal. Copies to counsel.
May 15	Appeal bond in the amount of $250.00 with St. Paul Fire & Marine Insurance Co. as surety, filed.

Complaint of Commonwealth of Massachusetts.

[Filed September 12, 1966.]

1. This action arises under the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat., 544 as amended and the Chandler Act of June 22, 1938, c. 575, 52 Stat., 883 as amended U.S.C. Title 11, §205, as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.

2. This is an action for declaratory judgment pursuant to U.S.C. Title 28, §2201, for the purpose of determining a question of actual controversy between the parties, as hereinafter more fully appears.

3. The Commonwealth of Massachusetts, acting through its Department of Public Works and in conjunction with the Massachusetts Bay Transportation Authority, is concerned with the development of a joint transportation corridor along the Southwest Expressway in Boston, Massachusetts. Under the terms of a preliminary joint transportation agreement, both agencies would make use of a railroad right-of-way for their respective purposes. The railroad property involved is owned by the Boston and Providence Railroad Company. It is the intention of the Commonwealth to acquire this property by eminent domain pursuant to Massachusetts General Laws, chapter seventy-nine.

4. In 1888, the Boston and Providence Railroad Company leased its properties to the Old Colony Railroad Company for a term of 99 years. The Old Colony Railroad leased certain properties to the New York, New Haven and Hartford Railroad in 1893. Included in the latter arrangement was the real property of the Boston and Providence Railroad Company, which is the subject matter of this action.

5. After proceedings for re-organization of the New York, New Haven and Hartford Railroad were instituted in 1935, said Railroad, pursuant to c. 77 of the Bankruptcy Act, rejected the 1893 lease and from 1938 to the present time the New York, New Haven and Hartford Railroad Company has operated the subject properties in the account of the Boston and Providence Railroad Company under the provisions of said c. 77 (§6). Shortly after the rejection of said lease the Boston and Providence Railroad Company commenced proceedings for re-organization pursuant to c. 77 of the Bankruptcy Act. At the present time the Boston and Providence Railroad Company is under the jurisdiction of the United States District Court for the District of Massachusetts.

6. The right-of-way of the Boston and Providence Railroad, which the Commonwealth seeks to acquire, consists of a seven mile strip of land commencing at a point in the vicinity of Ruggles Street, Boston and running southerly to a point in the vicinity of the Readville section of Hyde Park in Boston, according to the map attached hereto and marked Exhibit A.

7. The Massachusetts Department of Public Works has been authorized by the United States Department of Commerce, Bureau of Public Roads, to incur expense for preliminary right-of-way studies relative to the proposed transportation corridor for which the acquisition of the Boston and Providence Railroad right-of-way would be needed. This authorization has committed $135,000.00 in federal-aid funds. The total cost of this section of the proposed interstate highway is estimated at $75,000,000. It would be part of an interstate highway system constructed pursuant to the Federal Aid to Highways Act, Title 23, §101, et seq., the purpose of which, as declared by Congress, is the defense of the nation.

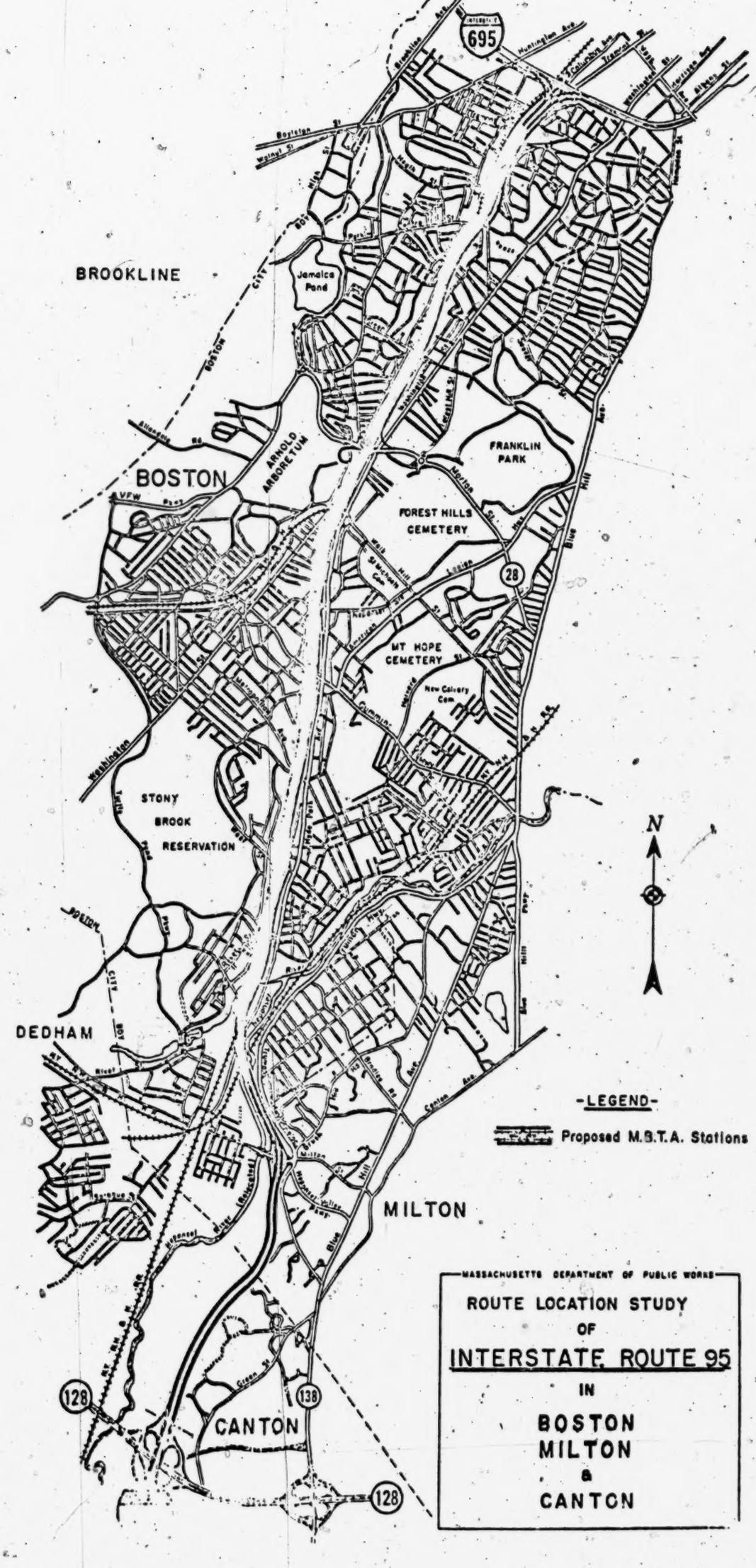
8. On June 15, 1966, pursuant to Massachusetts General Laws, Chapter 160, §7, written notice was sent to all interested parties by the Commonwealth stating therein the latter's intention to take the subject right-of-way by eminent domain at some time after the expiration of one year from the date of said notice.

9. After discussions with the trustee of the said Boston and Providence Railroad, the Commonwealth has been advised that it is the Railroad's contention that the consent of the Bankruptcy Court is a jurisdictional pre-requisite to any proceeding by the Commonwealth to take its property by eminent domain. It bases its position on the fact that possession and title to the Railroad property is in the bankruptcy trustee and subject to the control of the Federal Bankruptcy Court where it is undergoing re-organization. The trustee has further stated that he, in behalf of the railroad, would oppose any attempt by the Commonwealth to take the subject property by eminent domain. It is the position of the Commonwealth of Massachusetts that the power of eminent domain is an attribute of sovereignty, an inherent power that is necessary to the very existence of government; and that this power, and the authority by which a federal court administers the property of insolvent railroads stand independent o each other. For these reasons the consent of the federal court is not a jurisdictional pre-requisite to the Commonwealth's exercise of its right of eminent domain.

10. The Federal Aid to Highways Act requires completion of the interstate highway system by 1972. A lengthy delay in the adjudication of this matter would result in the Commonwealth's loss of federal aid funds and more than likely result in the failure to construct this vital link in the interstate highway system.

Wherefore, the plaintiff prays that this honorable court adjudge that the consent of the United States District Court for the District of Massachusetts is not a jurisdictional prerequisite to a taking by the Commonwealth of Massachusetts of the property of the Boston and Providence Railroad Company pursuant to General Laws Chapter 79.

COMMONWEALTH OF MASSACHUSETTS
EDWARD W. BROOKE
Attorney General
By: Richard A. Hunt
Assistant Attorney General
Richard L. Seegel
Assistant Attorney General



MASSACHUSETTS DEPARTMENT OF PUBLIC WORKS

ROUTE LOCATION STUDY

OF

INTERSTATE ROUTE 95

IN

BOSTON
MILTON
&
CANTON

Motion to Intervene of Massachusetts Bay Transportation Authority as a Plaintiff.

The Massachusetts Bay Transportation Authority, a political subdivision of the Commonwealth of Massachusetts, moves this court for an order permitting it to intervene herein, and to file its complaint in intervention, a copy of which said complaint is attached hereto.

The motion is based upon the following grounds:

1. The Massachusetts Bay Transportation Authority is in the process of extending rapid transit facilities in various directions from the City of Boston under a mandate of the General Court of Massachusetts, as set out in General Laws Chapter 161A.

2. The Massachusetts Bay Transportation Authority is engaged in the development of a joint transportation corridor along the Southwest Expressway. This plan will require the acquisition of an existing railroad right-of-way owned by the Boston and Providence Railroad Company. Under the terms of the proposed co-operation agreement of the Massachusetts Bay Transportation Authority will pay a percentage of the total cost of acquisition.

3. The intervention of the Massachusetts Bay Transportation Authority will not to any extent delay or prejudice the adjudication of the rights of the original parties.

Dated: Oct. 11, 1966

EDWARD F MCLAUGHLIN
WILLIAM D QUIGLEY
Attorneys for the Massachusetts Bay
Transportation Authority

Motion of Boston and Providence Railroad to Add Trustees of the New York, New Haven and Hartford Railroad as Defendants.

Now comes the respondent, Boston & Providence Railroad Corporation ("Boston & Providence") in the above-entitled action and moves this Honorable Court for an order under Rules 19 and 21 of the Federal Rules of Civil Procedure directing that the Trustees of the New York, New Haven and Hartford Railroad Company ("New Haven") be made parties respondent herein and for grounds therefor shows:

(1) This is an action for declaratory judgment brought by the Commonwealth of Massachusetts seeking to adjudicate its rights to take by eminent domain certain real property owned by the Boston & Providence;

(2) As alleged in the complaint, the properties sought to be taken by the Commonwealth have for many years been operated by the New Haven for the account of the Boston & Providence and the New Haven is currently operating them as of the date hereof. The issues raised by the complaint and answer involve, in large part, the rights of the Commonwealth to interrupt railroad service by taking property devoted to railroad purposes without permission of, among others, the governmental authorities having regulatory authority over railroad operations. Therefore, the New Haven, as the operating road, is a proper and necessary party to this action concerning the power of the Commonwealth to take.

(3) The Trustees have a usual place of business in Massachusetts and are subject to the jurisdiction of this Court as to service of process; they can be made a party without depriving the Court of jurisdiction.

Respectfully submitted,
Boston & Providence Railroad Company
By Joseph W. Bartlett

Answer and Counterclaim of Defendant Charles W. Bartlett, Trustee of Boston and Providence Railroad Company.

Answer

Defendant, Charles W. Bartlett, Trustee in Reorganization of the property of Boston and Providence Railroad Company, for answer to bill of complaint, says as follows:

First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

1. He admits the allegations of paragraph 1.
2. He admits the allegations of paragraph 2.
3. He admits the allegations in paragraph 3, except that he is without sufficient knowledge or information of the averments as to the intentions and concern of the Commonwealth to admit or deny the same, and calls upon the plaintiff for proof thereof, if material.
4. He admits the allegations in paragraph 4.
5. He admits that proceedings for the reorganization of the New York, New Haven and Hartford Railroad Company (hereafter called New Haven) and the Old Colony Railroad Company (hereafter called Old Colony) were instituted in the District Court of the United States for the District of Connecticut in 1935 under Sec. 77 of the Bankruptcy Act, and that the Trustees in Reorganization of said Old Colony under orders of the Connecticut Court rejected the lease of the Old Colony properties and ordered said properties to be thereafter operated by the New Haven Trustees under subdivision (c)(6) of Sec. 77. Since said date the Boston and Providence has been continuously in the process of reorganization in the District Court of the United States for the District of Massachusetts, and has

continued to be operated by the Trustees of the New Haven for the account of the Boston and Providence.

The remaining allegations in paragraph 5 are denied, except as herein expressly admitted.

6. He admits the allegations of paragraph 6.

7. He is without sufficient knowledge or information to admit or deny the allegations in paragraph 7.

8. He admits the allegations in paragraph 8.

9. He admits to the belief that, in order to effect a valid taking by eminent domain of the properties described in the foregoing complaint, it is necessary (1) that a certificate authorizing abandonment for railroad purposes shall first be obtained from the Interstate Commerce Commission, as provided in Federal Code, Tit. 49, Sec. 1 (18)-(20); (2) that the consent of the Massachusetts Department of Public Utilities must be obtained pursuant to M.G.L. c. 160, section 128 *et seq.;* and (3) that the consent of the Bankruptcy Court having charge of the reorganization of Boston and Providence should be obtained, and defendant says none of these prerequisites has been here complied with.

Defendant further says that the remaining allegations contained in paragraph 9 do not constitute allegations of fact, but are so argumentative as not to require categorial answer.

10. He is without sufficient knowledge and information to enable him to either admit or deny the allegations in paragraph 10, and calls upon the plaintiff to prove the same, if material.

11. Further answering, defendant says by way of affirmative defense that (i) plaintiff has not procured the required authorizations and consents as stated in paragraph 9 of defendant's answer and (ii) that the sole authority in the Commonwealth of Massachusetts to take the property of a railroad corporation by eminent domain is found

in M.G.L. c. 160, section 7, which authorizes the Commonwealth to take all, but not less than all, of a railroad corporation's "railroad, franchise and other property" and that, as appears from the face of the bill of complaint, the Commonwealth seeks to take less than all of defendant railroad corporation's property.

Third Defense

The defendant is sued in his capacity as an officer of the United States and this Honorable Court and the federal statute upon which jurisdiction is rested in the bill of complaint, 28 U.S.C. 2201, does not confer jurisdiction on this court to hear and determine an action of this nature between these parties.

COUNTERCLAIM

Defendant in the above entitled action and, by way of counterclaim to the above action for declaratory judgment, says as follows:

1. Without waiving his objection to the jurisdiction of the court but expressly relying thereon, he incorporates by reference the statements and contentions made by him in his answer, particularly paragraphs 9, 11 and 12 thereof.

2. He states that, as shown from the face of the bill of complaint, plaintiff threatens to take by eminent domain certain of defendant's property which plaintiff is not entitled to take because (i) plaintiff is without statutory or legal authority to take by eminent domain any portion less than all of railroad, franchise and other property belonging to the defendant; and (ii) whatever the authority granted the plaintiff under Massachusetts law, plaintiff may not take all or any part of defendant's property without consent and approval from the Interstate Commerce Commission, the Massachusetts Department of Public Utili-

ties and the Bankruptcy Court, and plaintiff has expressly refused to apply for such consent and approval, all as alleged in the above answer.

Wherefore, defendant prays that (i) this Honorable Court dismiss the bill of complaint for lack of jurisdiction or, in the event such prayer not be granted then, (ii) this Honorable Court adjudge and decree that (a) the plaintiff has no authority or power to take by eminent domain any portion less than all of defendant's "railroad, franchise and other property"; and that (b) the plaintiff must secure, prior to any taking by eminent domain of defendant's property under any form of authority, the authorization and approval of the Interstate Commerce Commission, the Massachusetts Department of Public Utilities and this Honorable Court.

Respectfully submitted,
CHARLES W. BARTLETT
Trustee in Reorganization of the
Property of the Boston and
Providence Railroad Company
By his Attorney,
Joseph W. Bartlett

Answer and Counterclaim of Defendants Richard Joyce Smith and William J. Kirk, Trustees of New York, New Haven and Hartford Railroad Company.

Come now Richard Joyce Smith and William J. Kirk, Trustees of the property of The New York, New Haven and Hartford Railroad Company, Debtor, defendants in the above-entitled action, and answer the complaint of plaintiff Commonwealth of Massachusetts as follows:

I.

The complaint fails to state a claim against defendants upon which relief can be granted.

II.

Answering the allegations of paragraph I of the complaint, defendants admit that the matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000. The remaining allegations of paragraph I of the complaint are denied.

III.

Defendants admit the allegations of paragraph 2 of the complaint.

IV.

Defendants admit the allegations of paragraph 3 of the complaint, except that defendants are without sufficient knowledge or information of the averments therein set forth as to the intentions and concern of the Commonwealth to admit or deny the same, and call upon plaintiff for proof thereof, if material.

V.

Defendants admit the allegations of paragraph 4 of the complaint.

VI.

Answering the allegations of paragraph 5 of the complaint, defendants admit that proceedings for the reorganization of The New York, New Haven and Hartford Railroad Company (hereinafter called "New Haven") and of the Old Colony Railroad (hereinafter called "Old Colony") were instituted in The United States District Court for the District of Connecticut in 1935 under the provisions of section 77 of the Bankruptcy Act; that the Trustees in Reorganization of the New Haven and of the Old Colony, pursuant to orders of said Court, rejected the respective leases of the Boston and Providence Railroad Company (hereinafter called "Boston and Providence") properties; and that said Court ordered said properties to be operated by the New Haven under section 77 (c)(6) of the Bankruptcy Act for the account of Boston and Providence and without expense to the New Haven. Defendants further admit that since shortly after such rejection the Boston and Providence has been continuously in the process of reorganization in the United States District Court for the District of Massachusetts.

And further answering the allegations of paragraph 5 of the complaint, defendants aver that said Reorganization Court, in its order consummating the plan of reorganization of the New Haven, reserved jurisdiction over any question arising out of the operation of the lines of the Boston and Providence by the reorganized New Haven. Since the commencement of the second reorganization of the New Haven in the United States District Court for the District of Connecticut in July 1961, defendants have, by order of said Court, continued such operation as part of the New Haven Railroad system. The remaining allegations of paragraph 5 of the complaint are denied except as herein expressly admitted.

VII.

Defendants admit the allegations of paragraph 6 of the complaint.

VIII.

Defendants are without sufficient knowledge or information to admit or deny the allegations in paragraph 7 of the complaint, and call upon plaintiff for proof thereof, if material.

IX.

Answering the allegations of paragraph 8 of the complaint, defendants admit that they received a copy of a notice dated June 15, 1966 purporting to have been issued pursuant to Chapter 160, section 7, of the General Laws of Massachusetts stating the Commonwealth's intention to take the subject right-of-way by eminent domain at some time after the expiration of one year from the date of said notice. Defendants are without sufficient knowledge or information to admit or deny the allegation contained in paragraph 8 that said notice was sent to all interested parties.

X.

Defendants are without sufficient knowledge or information to admit or deny the allegations in paragraphs 9 and 10 of the complaint, and call upon plaintiff to prove the same, if material.

XI.

Further answering, defendants say by way of affirmative defense that the railroad properties described in the complaint are operated by defendants by order of the United States District Court for the District of Connecticut, and that the consent of said Court must be first obtained in

order to effect a valid taking by the Commonwealth of said properties by eminent domain. No such consent has been obtained or sought by the Commonwealth.

XII.

And further answering, defendants say by way of affirmative defense that the railroad properties described in the complaint are operated by defendants as an integral part of the interstate and intrastate railroad system of the New Haven and of the nation's interstate railroad system. Such properties are utilized by defendants in the movement of substantial volumes of rail freight traffic moving in interstate and intrastate commerce, including shipments moving in interline service with other railroads, and including a substantial number of shipments moving from and to private side tracks and public delivery tracks that can only be served by defendants via the properties of Boston and Providence described in the complaint. Forest Hills and Boylston Street freight stations of the New Haven are located within the area described in the complaint.

Defendants further utilize such properties for the rail transportation of substantial amounts of mail and express traffic, and for the movement of a large number of interstate and intrastate passengers. Defendants operate Back Bay passenger station on the line of railroad described in the complaint, which station is used by thousands of passengers annually, both interstate and intrastate, substantially all of whom travel by rail between Back Bay station and points south and west thereof via said line of railroad. Certain suburban passenger trains so operated by defendants are operated pursuant to an agreement between defendants and Massachusetts Bay Transportation Authority, and the service provided by the interstate passenger trains so operated is the subject of agreements between defendants and the plaintiff Commonwealth of Massachu-

setts and the State of Rhode Island. Authority to discontinue the operation of said interstate passenger trains was denied defendants by order of the Interstate Commerce Commission, served April 27, 1966, in Finance Docket No. 23831 (327 I.C.C. 151).

In order to effect a valid taking by eminent domain of the properties described in the complaint, it is necessary that a certificate of public convenience and necessity authorizing abandonment of the New Haven's railroad operations thereon be first obtained from the Interstate Commerce Commission pursuant to sections 1(18)-1(20) of the Interstate Commerce Act (49 U.S.C. sec. 1 *et seq.*). No such certificate has been issued by the Interstate Commerce Commission nor has any such certificate been applied for.

XIII.

And further answering, defendants say by way of affirmative defense that to effect a valid taking of the properties described in the foregoing complaint it is necessary that the consent of the Massachusetts Department of Public Utilities must be first obtained pursuant to the provisions of Chapter 160, section 128 *et seq.*, of the General Laws of Massachusetts, which consent has not been obtained or sought by plaintiff.

XIV.

And further answering, defendants say by way of affirmative defense that the sole authority in the Commonwealth of Massachusetts to take the property of a railroad corporation by eminent domain is found in Chapter 160, section 7, of the General Laws of Massachusetts, which section authorizes the Commonwealth to take all, but not less than all, of a railroad corporation's "railroad, franchise and other property"; and that, as appears from the face of the

bill of complaint, the Commonwealth seeks to take less than all of the property of defendant Boston and Providence.

XV.

And further answering, defendants say by way of affirmative defense that the consent of the Court having charge of the reorganization of the Boston and Providence must be first obtained to effect a valid taking of the properties described in the complaint, which consent has not been sought or obtained by the plaintiff.

COUNTERCLAIM

Defendants, by way of counterclaim to the above action for declaratory judgment, say as follows:

1. Defendants incorporate by reference the statements and contentions made by them in their answer, particularly paragraphs VI and XI through XV thereof.

2. Defendants state that, as appears from the face of the complaint, plaintiff threatens to take by eminent domain certain properties of the defendant Boston and Providence operated by defendants and to thereby force the termination of defendants' railroad operations thereon, which taking plaintiff is not entitled to effect because (i) plaintiff is without statutory or legal authority to take by eminent domain any portion less than all of the railroad, franchise and other property belonging to defendants Boston and Providence; and (ii) whatever the authority granted plaintiff under Massachusetts law, plaintiff may not take all or any part of said property without the prior consent and approval of the Interstate Commerce Commission, the Massachusetts Department of Public Utilities, the Court having charge of the reorganization of the Boston and Providence, and the Court having charge of the reorgani-

zation of the New Haven; and that plaintiff has expressly refused to apply for such consent and approval, all as alleged in the above answer.

Wherefore, defendants pray that this Honorable Court adjudge and decree that: (1) the plaintiff has no authority or power to take by eminent domain any portion less than all of the "railroad, franchise and other property" of defendant Boston and Providence; and (2) the plaintiff must secure, prior to any taking by eminent domain of the property of said defendant under any form of authority, the authorization and approval of the Interstate Commerce Commission, the Massachusetts Department of Public Utilities, this Honorable Court in proceedings for the reorganization of the Boston and Providence, and the United States District Court for the District of Connecticut in proceedings for the reorganization of the New Haven.

Respectfully submitted,
SULLIVAN & WORCESTER
Robert G Bleakney Jr.
By Robert G. Bleakney, Jr.
225 Franklin Street
Boston, Massachusetts 02110
Attorneys for Richard Joyce Smith and William J. Kirk, Trustees of the property of The New York, New Haven and Hartford Railroad Company, Debtor.

Robert W. Blanchette
54 Meadow Street
New Haven, Connecticut 06506

Plaintiff's Motion for Summary Judgement.

Plaintiff moves the Court as follows:

That entry be made, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment in Plaintiff's favor for the relief demanded in its complaint on the ground that there is no genuine issue as to any material fact and that the Plaintiff is entitled to a judgment as a matter of law.

COMMONWEALTH OF MASSACHUSETTS
EDWARD W. BROOKE
Attorney General
By: Richard L. Seegel
Assistant Attorney General
State House
Boston, Massachusetts

Motion of Defendant Charles W. Bartlett to Dismiss Complaint.

Defendant Charles W. Bartlett, as he is Trustee of the Boston and Providence Railroad Company, moves the Court to dismiss the Complaint filed by the Plaintiff herein, because it fails to state a claim against said Defendant upon which relief can be granted.

CHARLES W. BARTLETT,
Trustee in Reorganization of
the Property of the Boston and
Providence Railroad Company,
By his attorney,
Joseph W. Bartlett

Motion of Defendant Charles W. Bartlett for Summary Judgment.

Defendant Charles W. Bartlett, as he is Trustee of the Boston and Providence Railroad Company, moves the Court as follows:

That entry be made, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment in said Defendant's favor for the relief demanded in his counterclaim on the ground that there is no genuine issue as to any material fact and that said Defendant is entitled to a judgment as a matter of law.

CHARLES W. BARTLETT,
Trustee in Reorganization of
the Property of the Boston and
Providence Railroad Company,
By his attorney,
Joseph W. Bartlett

Motion of Defendants Richard Joyce Smith and William J. Kirk, Trustees, for Summary Judgment.

Defendants Richard Joyce Smith and William J. Kirk, Trustees of the property of The New York, New Haven and Hartford Railroad Company, move the Court as follows:

That entry be made, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment in said Defendants' favor for the relief demanded in their counterclaim on the ground that there is no genuine issue as to any material fact and that said Defendants are entitled to a judgment as a matter of law.

RICHARD JOYCE SMITH and
WILLIAM J. KIRK,
Trustees of the property of
The New York, New Haven and Hartford
Railroad Company, Debtor.
By their attorney
Robert G. Bleakney, Jr.
Robert G. Bleakney, Jr.
225 Franklin Street
Boston, Massachusetts 02110

Robert W. Blanchette, Esq.
54 Meadow Street
New Haven, Connecticut
Of Counsel

Motion of Defendants Richard Joyce Smith and William J. Kirk, Trustees, to Dismiss Complaint.

Defendants Richard Joyce Smith and William J. Kirk, Trustees of The New York, New Haven and Hartford Railroad Company, Debtor, move the Court to dismiss the Complaint filed by the Plaintiff herein, because it fails to state a claim against said Defendants upon which relief can be granted.

RICHARD JOYCE SMITH and
WILLIAM J. KIRK,
Trustees of the property of
The New York, New Haven and Hartford
Railroad Company, Debtor.
By their attorney
Robert G. Bleakney, Jr.
Robert G. Bleakney, Jr.
225 Franklin Street
Boston, Massachusetts 02110

Robert W. Blanchette, Esq.
54 Meadow Street
New Haven, Connecticut 06506
Of Counsel

Plaintiff's Motion to Dismiss Counterclaim.

The Plaintiff moves the Court to dismiss the counter claim filed by the Defendant herein as follows:

1. Because it fails to state a claim against the Plaintiff upon which relief can be granted.

2. Because it merely re-states matters previously pleaded both in the Answer and in the affirmative defenses contained in the Answer under the label of a counter claim.

COMMONWEALTH OF MASSACHUSETTS
By Its Attorney
Edward W. Brooke
Attorney General
Richard L. Seegel
Assistant Attorney General

Agreed Statement of Facts.

[Filed March 13, 1967.]

1. For the limited purposes of this proceeding it may be assumed that the Boston and Providence Railroad Corporation owns in fee certain real property located to the south and west of the City of Boston.

2. In 1888, the Boston and Providence Railroad leased its lines for 99 years to the Old Colony Railroad Company. In 1893 Old Colony made a 99 year lease of its railroad properties, including its leasehold interest in the Boston and Providence, to The New York, New Haven and Hartford Railroad Company ("New Haven"), and the latter was operating these lines when proceedings for the reorganization of the New Haven and of the Old Colony Railroad ("Old Colony") were instituted in The United States District Court for the District of Connecticut in 1935 under the provisions of section 77 of the Bankruptcy Act. The Trustees in Reorganization of the New Haven and of the Old Colony, pursuant to orders of said Court, rejected the respective leases of the Boston and Providence properties and the Court ordered such properties to be operated by the New Haven under section 77(c)(6) of the Bankruptcy Act, 11 U.S.C.A. §205, sub. (c)(6), for the account of Boston and Providence and without expense to the New Haven.

3. A plan of reorganization of the New Haven in the first reorganization proceedings was consummated by order of the Court in 1947. In its order consummating the plan of reorganization, the Court reserved jurisdiction over any question "arising out of the operation of" the lines of the Boston and Providence by the reorganized New Haven.

4. In 1961, a second proceeding for the reorganization of the New Haven was commenced in The United States

District Court for the District of Connecticut. Richard Joyce Smith, Harry W. Dorigan and William J. Kirk were appointed Trustees of the property of the New Haven, and, since the death of Mr. Dorigan, Mr. Kirk and Mr. Smith have served as sole Trustees by order of the Reorganization Court. Also by order of that Court the Trustees of the New Haven have continued to operate the Boston and Providence properties and are currently doing so.

5. At the commencement of the first reorganization proceedings of the New Haven, that railroad was operating the lines of the Boston and Providence pursuant to lease. Pursuant to orders of the Courts having jurisdiction over the two reorganizations of the New Haven, such operation has continued to date first by the Trustees in the first reorganization, then by the New Haven, and since August 1961 by the Trustees in the second reorganization.

6. Since 1938, the Boston and Providence has been continuously in the process of reorganization in the Federal District Court for the District of Massachusetts. The Massachusetts District Court appointed two Trustees of the properties of the Boston and Providence and Charles W. Bartlett currently serves as the sole Trustee.

7. The Commonwealth of Massachusetts, acting through its Department of Public Works and in conjunction with the Massachusetts Bay Transportation Authority, is concerned with the development, with the aid of federal funds, of a joint transportation corridor along the proposed Southwest Expressway in Boston, Massachusetts. That part of the corridor on which an interstate highway would be constructed would be an extension of the present Route I-95 from Providence, Rhode Island, which now terminates at Route 128 in Milton, Massachusetts. For this purpose, it is the intention of the Commonwealth to acquire a portion of the right-of-way of the Boston and Providence by

eminent domain pursuant to Massachusetts General Laws, Chapter 79.

8. The specific right-of-way which the Commonwealth seeks to acquire, consists of a strip of land approximately seven miles long commencing at a point in the vicinity of Ruggles Street in Boston and extending southerly to a point in the vicinity of Hyde Park in Boston. The Massachusetts Department of Public Works has been authorized by the United States Department of Commerce, Bureau of Public Roads, to incur expense for preliminary right-of-way studies relative to the proposed transportation corridor. This authorization has thus far committed in excess of $135,000 in federal-aid funds. It is estimated that the total cost of this section of the proposed interstate highway will be $75,000,000. It would be part of an interstate highway system constructed pursuant to the Federal Aid to Highways Act, Title 23 U.S.C. §101 *et seq.*, the purpose of which, as declared by Congress, is the defense of the Nation.

9. On June 15, 1966, pursuant to Massachusetts General Laws, Chapter 160, §7, written notice was sent to the Trustees of the Boston and Providence and to the Trustees of the New Haven by the Commonwealth stating therein the latter's intention to take the subject right-of-way by eminent domain at some time after the expiration of one year from the date of said notice.

10. Pursuant to approval from the Massachusetts District Court, the Trustee of the Boston and Providence has retained qualified consultants to appraise such of the right-of-way as the Department of Public Works has expressed interest in, has communicated the results of such appraisals to the Department, and has solicited an offer for the properties involved from the Department with a view to negotiating a sale. Since the Department has not com-

pleted its appraisal of the subject properties, it is unable to communicate any offer to the Trustee at this time.

11. Both the Boston and Providence and the New Haven are common carriers by railroad in interstate commerce subject to the provisions of the Interstate Commerce Act, 49 U.S.C.A. §1 *et seq.*

12. The properties of the Boston and Providence sought by the Commonwealth are operated by the Trustees of the New Haven as an integral part of the New Haven's interstate and intrastate railroad system and of the nation's interstate railroad system. Such properties are utilized by the New Haven for the movement of substantial volumes of rail freight traffic moving in interstate and intrastate commerce, including shipments moving in interline service with other railroads, and including a substantial number of shipments moving from and to private side tracks and public delivery tracks located on or adjacent to the right-of-way of the Boston and Providence sought to be taken by the Commonwealth. Forest Hills and Boylston Street freight stations of the New Haven are located within the area involved.

13. The New Haven also utilizes such properties for the rail transportation of substantial amounts of mail and express traffic, and for the movement of a large number of interstate and intrastate passengers. The New Haven operates Back Bay passenger station of the line of railroad involved, a station used by thousands of passengers annually, both interstate and intrastate, substantially all of whom travel by rail between Back Bay station and points south and west thereof via said line of railroad. Certain suburban passenger trains so operated by defendants are operated pursuant to an agreement between the New Haven and Massachusetts Bay Transportation Authority, and the service provided by the interstate passenger trains

so operated is the subject of agreements between New Haven and the Commonwealth of Massachusetts and the State of Rhode Island. Authority to discontinue the operation of said interstate passenger trains was denied the New Haven by order of the Interstate Commerce Commission, served April 27, 1966, in Finance Docket No. 23831 (327 I.C.C. 151). The Massachusetts Bay Transportation Authority is presently preparing plans for the possible extension of its mass transportation service from the Back Bay station to the vicinity of Route 128.

14. The taking by eminent domain proposed by the Commonwealth would, if effected, result in the complete termination of all railroad operations over the right-of-way involved, would prevent the continuance of any of the present rail passenger service now provided by the New Haven between Back Bay station and points south and west thereof, and cause the complete elimination of rail freight service now provided by New Haven to shippers and receivers of freight on private side tracks and public delivery tracks along such right-of-way, including the elimination of Forest Hills and Boylston Street freight stations of the New Haven.

15. The New Haven owns and operates a line of railroad that connects with the main line of the Boston and Providence at approximately Readville, Massachusetts to South Station, Boston, Massachusetts, which line is referred to as the "Midland Division" line. The New Haven presently conducts freight operations over such line. The Midland Division line can be upgraded and modified so as to become capable of handling both the number of trains now operated over that line and the number of trains presently operated by the New Haven over the Boston and Providence line sought to be taken. Such upgrading and

modification would entail the expenditure of substantial amounts of money.

COMMONWEALTH OF MASSACHUSETTS
By Richard L. Seegel
Assistant Attorney General

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY
By William D. Quigley
Its Attorney

CHARLES W. BARTLETT,
As he is Trustee of the Boston and Providence Railroad Corporation
By Joseph W. Bartlett
His Attorney

RICHARD JOYCE SMITH and
WILLIAM J. KIRK,
Trustees of the Property of The New York, New Haven and Hartford Railroad Company
By Robert G. Bleakney, Jr.
Their Attorney

Letter, Dated January 2, 1968, from Charles W. Mulcahy, Jr. et al. to Thaddeus Forbes.

CHARLES W. MULCAHY, JR.
200 Berkeley Street
Boston, Mass.

- Copy -

January 2, 1968

Thaddeus Forbes, Secretary
Interstate Commerce Commission
Washington, D. C.

Re: Boston and Providence Railroad
Docket No. 12131

Dear Mr. Forbes:

I wish to advise you that on Tuesday, December 26, 1967, Mason Lemont, Assistant Secretary of the State Street Bank, George Kerins, Regional Auditor of the Interstate Commerce Commission, and myself, met at the office of the State Street Bank and Trust Company, 53 State Street, Boston, and inspected and counted the ballots on the acceptance or rejection of a Plan of Reorganization of the Boston and Providence Railroad. Present on that date (but not participating) were Messrs. Lacy, Perera, Rood, and a representative of James Garfield. The ballots were inspected and counted on that date and then placed in a sealed vault.

On Tuesday, January 2, 1968, I again met with Mr. Kerins and Mr. Lemont at the office of the State Street Bank to complete the final audit and the preparation of work and summary sheets. The ballots, work sheets and summary sheets are being sent to you under separate cover by Mr. Kerins.

Mr. Lemont, Mr. Kerins and myself hereby certify to the Commission that the following are the results of the balloting according to our tabulation:

1. *Debentures*—$2,170,000 face value of debentures were voted for the plan.
2. *New Haven Owned Stock*—15,918 shares of stock (including 640 shares owned by East Hartford Freight) were voted in favor of the plan.
3. *Publicly Held Stock*—17,834 shares cast ballots. Of this amount, 12,670 voted for acceptance of the plan, 2,946 voted for rejection, and 2,218 were found to be defective. A breakdown of the defective ballots showed that, if otherwise valid, 1,445 would have favored the plan, 38 would have been opposed, and the remaining 735 did not indicate their choice.

Very truly yours,

s/ GEORGE J. KERINS, JR.
Regional Auditor
Interstate Commerce Commission

s/ MASON M. LEMONT
Assistant Secretary
State Street Bank & Trust Co.

s/ CHARLES W. MULCAHY, JR.
Attorney for Trustee of
Boston & Providence Railroad

CWMjr:w
Copy to
Richard Block, Deputy Director, ICC, Washington
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